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No. 99-830

In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al., *Petitioners*,

v.

LEROY CARHART, M.D., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion for Leave to File and Brief of Amici Curiae Alabama, Iowa, Louisiana, New Jersey Legislature*, Pennsylvania, Virginia, South Carolina, South Dakota, Utah, and West Virginia Gov. Cecil Underwood in Support of Petitioners

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QUESTIONS PRESENTED

Amici Curiae request the Court to grant a writ of certiorari for the first two of Petitioners' questions, as summarized below. Amici Curiae do not believe that Petitioners' final two questions need be reached to resolve this case.

I. Whether the Eighth Circuit erred in broadly construing Nebraska's partial-birth abortion ban (unlike the Seventh Circuit's narrow construction of similar partial-birth abortion bans), thereby concluding that it reached conventional abortion methods, not just the intact D&X procedure?

II. Whether the Eighth Circuit erred by holding that Nebraska's law imposed an undue burden on the right to abortion?

MOTION FOR LEAVE TO FILE

Amici Curiae move for leave to file the attached Brief pursuant to Supreme Court Rule 37.2(b). The brief is presented on behalf of the States of Alabama, Iowa, Louisiana, Pennsylvania, South Carolina South Dakota, Utah, and Virginia, submitted by the States' Attorneys General, who are counsel on the Brief. If these Amici alone filed the present Brief, no consent for filing would be required under Supreme Court Rule 37.4.

The Brief is also presented by the New Jersey Legislature and West Virginia Governor Cecil H. Underwood, who have retained private counsel to defend their respective state laws restricting the practice of partial-birth abortion. The Clerk of this Court has instructed Counsel of Record that in the present situation a motion for leave to file is required.

Consent to the filing of this brief by the West Virginia "Governor and such attorneys general and other governmental entities (e.g., the New Jersey Legislature) as may wish to join the brief" was sought from the Nebraska Attorney General, on behalf of all Petitioners, and from Simon Heller, counsel for Respondent. (*See* consent letter, described next.) Consent was obtained from Petitioners, as evidenced by a letter signed by L. Steven Grasz, Deputy Nebraska Attorney General, filed with the Clerk. However, Mr. Heller denied consent.

Amici Curiae are States and state actors that have an interest in having this Court accept a partial-birth abortion case for review. Amici Curiae States have either enacted statutes restricting partial-birth abortion procedures or have an interest in enacting such a ban. The New Jersey Legislature and West Virginia Gov. Underwood are actively defending laws restricting partial-birth abortion that they helped to enact. All Amici have a general interest in seeing such laws upheld against constitutional attack so that they may be enforced.

This Brief has a unique perspective from that of the parties. It supports the Petitioners by explaining why the Court should grant their petition for a writ of certiorari, but it also demonstrates why the Court should only accept for review the first two of Petitioners' four questions presented.

The Brief provides other relevant matter not already brought to the Court's attention by the parties by providing the larger context for consideration of Nebraska's petition for this Court to accept review of its law restricting partial-birth abortion. The Brief does this by (1) providing the argument for the constitutionality of a partial-birth abortion restriction that was made in the United States Congress in 1995, when restrictions on partial-birth abortion were first proposed, especially the issue of when abortion jurisprudence ceases to govern matters relating to birth; (2) setting out the federalism concerns raised by court decisions in many partial-birth abortion cases with respect to issues of statutory construction, abstention, and the facial challenge standard of review; and (3) demonstrating how partial-birth abortion is a matter of great public interest by fully cataloging the state statutes restricting partial-birth abortion and the litigation involving the statutes.

For the foregoing reasons, Amici Curiae pray the Court to grant this Motion and accept for filing the attached Brief.

Respectfully submitted,
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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE[1]

Amici Curiae are states and state actors that have an interest in having this Court accept a partial-birth abortion case for review. Most of Amici Curiae states have enacted statutes banning partial-birth abortion procedures. Over half of the states have enacted bans on partial-birth abortion. Some of these statutes are in effect, but others are under federal court injunction. The states have a strong interest in having bans against partial-birth abortion declared constitutionally permissible so that their own similarly-worded bans may be enforced.

SUMMARY OF THE ARGUMENT

Amici Curiae ask the Court to accept one or more partial-birth abortion cases for review, only requesting in the present case review of the first two questions presented by Petitioners Stenberg et al. concerning construction and undue burden. The partial-birth abortion issue is ripe for review because it is one of great national importance – as evidenced by the passing of partial-birth abortion bans in nearly three-fifths of the States, extensive litigation, and extensive congressional activity – and because of developed evidentiary records (the Nebraska and Wisconsin cases had full trials), polished arguments, and a conflict between the Seventh and Eighth Circuits.

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[1]Pursuant to Supreme Court Rule 37.6, Amici Curiae disclose that (1) no counsel for a party authored this brief in whole or in part and (2) no monetary contribution was made to the preparation or submission of this brief by any person or entity, other than the Amici Curiae, its members, or its counsel.

ARGUMENT

I. Amici Curiae Request Review of the First Two Questions Presented.

Petitioners Stenberg et al. presented four questions in their petition for a writ of certiorari. Amici Curiae believe this case can be resolved on the basis of the first two questions presented: (1) whether the Nebraska act should be narrowly construed so as to reach only a procedure known as intact D&X, and (2) whether, as so construed, the act imposes an undue burden on the right to abortion? Therefore, Petitioners' latter two questions need not be reached: (3) whether a human being delivered but for its head is a Fourteenth-Amendment person, and (4) whether the Court should now recognize abortion as a legislative issue?

The United States Court of Appeals for the Seventh Circuit recently upheld similar partial-birth abortion prohibitions in consolidated cases from Illinois and Wisconsin without having to reach issues (3) and (4) presented by Petitioners Stenberg et al. (These cases will soon be the subject of petitions for a writ of certiorari in this court, Justice Stevens having granted stays. *Planned Parenthood of Wis. v. Doyle*, 99A428 (U.S. Nov. 30, 1999) and *Hope Clinic v. Ryan*, 99A427 (U.S. Nov. 30, 1999) (orders staying mandate of Seventh Circuit)).

Similarly, the United States Court of Appeals for the Fourth Circuit stayed a Virginia district court's preliminary and permanent injunctions against enforcement of a similar partial-birth abortion statute without having to reach issues (3) and (4). *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) (Luttig, J.), *aff'd*, 183 F.3d 303 (4th Cir. 1998) (staying prelim. injunction); *Richmond Med. Ctr. for Women v. Gilmore*, No. 98-1930(L) (4th Cir. Sept. 14, 1999) (order staying permanent injunction).

In fact, the federal partial-birth abortion ban bills, upon which Nebraska's ban and most other state bans are modeled, were premised in part on the belief that abortion jurisprudence does not even govern a statute involving partial-birth or parturition (but if it does govern then there is no "undue burden" on the abortion right). *See* H.R. Rep. No. 104-267, at 9 (1995)[2] (the report of the House Committee on the Judiciary recommending passage of Partial-Birth Abortion Ban Act of 1995); *The Partial Birth Abortion Ban Act of 1995: Hearings on H.R. 1833 Before the Sen. Comm. on the Judiciary*, 104th Cong., 1st Sess. 172 (Nov. 17, 1995) (written Testimony of Prof. Douglas W. Kmiec) (setting out basically the argument given herein). This understanding of the Constitution and this Court's decisions is discussed more fully below. As shall also be shown, partial-birth abortion bans may be readily upheld even within this Court's current abortion jurisprudence.

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[2]The twelve-page report discussed the constitutionality of the partial-birth abortion ban under various levels of scrutiny. It declared that:

> The Supreme Court has never decided the constitutional status of a child in the process of being born. But even under *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, H.R. 1833, the "Partial-Birth Abortion Ban Act of 1995," is constitutional both before and after fetal viability. . . . In fact, in *Roe* the Court specifically noted that a Texas statute that made killing a child during the birth process a felony had not been challenged. . . . [H.R. Rep. No. 104-267, at 9.]

A. Serious federalism concerns are raised by the partial-birth abortion cases, including construction and the facial challenge standard.

The partial-birth abortion cases raise important federalism issues requiring resolution by this Court, including statutory construction and the facial challenge standard.

Under an appropriately narrow construction,[3] partial-birth abortion bans reach only one rarely-used procedure, intact D&X. Such limited bans pose no undue burden (even if abortion jurisprudence is applicable) because they have neither the purpose nor the effect of placing a substantial obstacle in the path of women seeking an abortion. Furthermore, the limited bans are amply justified by sufficient and indeed compelling state interests, including interests in protecting partially-born human life, erecting an impenetrable barrier against infanticide, and protecting maternal health, as well as a moral interest in preventing an especially offensive procedure.

However, the Eighth Circuit and numerous other federal courts have refused to adopt a narrow construction of partial-birth abortion statutes – refusing to show any deference to reasonable constructions offered by state enforcement authorities – and have instead adopted the untenable position that state legislatures had the purpose of banning virtually all common methods of abortion in open defiance of this Court's holdings

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[3]A threshold issue, not addressed by the Eighth Circuit, is whether federalism mandates that the state courts be afforded the first opportunity to give the new state statute an authoritative construction that may eliminate or narrow the federal constitutional issues presented here, under the doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). While the Seventh Circuit was more sensitive to the demands of federalism, it too failed to address the advisability of *Pullman* abstention.

on abortion.[4] This Court has made it clear that it will not "cast a blind eye on over-reaching by lower federal courts" and "undoubtedly should" grant certiorari in order to prevent "blatant federal-court nullifications of state law" by means of "state-law determinations that seem plainly wrong." *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996).

The Fourth and Seventh Circuits have set the example of how a partial-birth statute ought to be construed, adopting narrow constructions under which only a procedure known as intact dilation and extraction[5] is prohibited. *Richmond Med.*

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[4]In accord with its concern for federalism, this Court has repeatedly indicated that the federal courts should accept a state's representations – whether sworn or unsworn, at oral argument or in memoranda, at the trial level or on appeal – as to the scope or meaning of a statute or ordinance. *E.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987); *Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489, 494 n.5 (1982); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Federalism also mandates the presumption that the state legislature acted with knowledge of existing constitutional restrictions and did not intend to transgress those restrictions. *See, e.g., McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969).

[5]Intact dilation and extraction ("intact D&X") typically involves two days of cervical dilation to allow the trunk of a fetus to be extracted, followed by feet-first extraction of a living, post-20-week human being from the uterus until the head lodges in the cervical os, at which time the child's skull is punctured and the brain is suctioned out to collapse the head and permit extraction of the child.. *See Hope Clinic v. Ryan*, — F.3d —, 1999 WL 974098 at *2 (7th Cir. 1999) (upholding partial-birth abortion bans from Illinois and Wisconsin).

It is possible to conceive of variations of the intact D&X that the statutes would also ban (for example, where the partially-delivered child is killed by lethal injection rather than by brain suction). As a factual matter,

(continued...)

Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998) (Luttig, J.), *aff'd*, 183 F.3d 303 (4th Cir. 1998) (staying prelim. injunction); *Richmond Med. Ctr. for Women v. Gilmore*, No. 98-1930(L) (4th Cir. Sept. 14, 1999) (order staying permanent injunction).

However, most other federal courts have, as one commentator noted (concerning a case involving an early statute designed to stop partial-birth abortion),

> crafted an opinion unconstrained by the Supreme Court's 'cardinal principle' [that federal courts must give state statutes a narrowing construction where reasonably possible to save them from constitutional assault] or any other standard of statutory interpretation. Rather, the opinion's only consistent interpretive principle is that standards of interpretation are selectively and temporarily employed and rejected to flout the Supreme Court's mandate and find the statute unconstitutional.

Comment, 112 Harv. L. Rev. 731 (1999) (discussing *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998)).

Another key federalism issue is what standard should be applied to facial challenges to state statutes under the federal constitution. *United States v. Salerno*, 481 U.S. 739, 745 (1987), should apply to partial-birth abortion cases and plaintiffs should prevail only if they have demonstrated that there is "no set of circumstances under which the Act would be valid."

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[5](...continued)
such potential variations do not figure in this case or in currently recognized abortion practices and need not be distinguished from the intact D&X procedure described above. For purposes of this brief, these variations will be treated as subsumed under the term "intact D&X."

Id. Under the *Salerno* rule, their challenges must fail because they have clearly failed to demonstrate that the Act is unconstitutional under many circumstances, e.g., as applied to post-viability elective intact D&X abortions not done to preserve maternal life or health, or when there is clearly no demonstrable differential health benefit in performing such an abortion. Even if *Salerno* does not apply and partial-birth abortion laws are subject to the "undue burden" test of *Casey*, they do not impose a substantial obstacle to abortion for a large fraction of women for whom they are relevant. *Cf. Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

This Court has not resolved under what circumstances the *Salerno* test should apply to challenges to abortion legislation. The circuit courts are badly divided on the issue,[6] as is this Court. *Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993).

In the partial-birth abortion cases, the important issue of what standard to apply in facial challenges – especially those involving abortion – is at issue. A partial-birth abortion case would be an excellent vehicle for this Court to clarify the confused facial challenge issue. This is a vital federalism issue because federal courts are too readily striking down partial-birth abortion statutes with constitutional applications, depriving the states of the opportunity to construe and work out the meaning of their own statutes in the context of litigation involving real-life facts.

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[6]*Cf., e.g., Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (employing *Salerno* facial challenge test in abortion case) *with Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th. Cir. 1995) (not employing *Salerno* test in abortion case). *See also City of Chicago v. Morales*, 119 S. Ct. 1849 (1999).

B. The partial-birth abortion cases raise the issue of precisely when the waxing state interest in a child outweighs the waning abortion interest.

The second issue that this Court should consider in a partial-birth abortion case is whether the abortion right is burdened at all. As noted above, the partial-birth abortion laws were premised in part on the notion that abortion jurisprudence does not even apply to a partial-birth abortion statute because the constitutional equation has changed with the changed location of human offspring. The abortion right involves an "unborn" human being (not one partially born) and the termination of a pregnancy (which barely exists, if at all, when a child is partially delivered). Therefore, there could be no "undue burden" under a *Casey* analysis because a *Casey* analysis would not apply.

But even if some abortion interest remains when a child is partially born, what is the precise moment when the waxing state interest in the child outweighs the waning abortion interest? Three-fifths of the States now say by their partial-birth abortion bans that the constitutional balance tips when the fetus moves out of the womb and becomes a partially-born child.

That, then, is the overriding substantive issue of this case – one which this Court has not decided, as shown next. It is the issue this Court ought to decide: Does an abortion right apply in a partial-birth situation and, if so, when must it yield to a state's interest in the child?

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that the Texas anti-abortion statute at issue was unconstitutional, but the Court also noted that another Texas statute that bans killing children in parturition was unchallenged and unaffected. As quoted by the Court, this statute provides as follows:

> Art. 1195. Destroying unborn child.—Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

Id. at 118 n.1.[7] The Texas parturition statute remains operative. Tex. Rev. Civ. Stat. Ann. art. § 4512.5 (West 1996). *See* Tex. Att'y Gen. Opinion H-369 (Aug. 13, 1974) (Texas parturition statute unaffected by *Roe)*; *Showery v. Texas*, 690 S.W.2d 689, 692 (Tex. Ct. App. 1985) (Texas parturition statute retains "current viability").[8]

The partial-birth abortion bans are based in part on the premise that states have a compelling interest in protecting the actual life of a child in the process of birth that is greater than, and distinguishable from, a state's interest in the "potential life" of a fetus in utero, which this Court has termed "substantial." *Casey*, 505 U.S. at 876. As the Wisconsin District Court found,

> when the physician kills a child in a partial birth abortion, the child "is merely inches from being delivered and obtaining full legal rights of personhood under the US Constitution." Accordingly, . . . partial birth abortion is "closer to infanticide than it is to abortion." The [Wisconsin State] legislators who filed an amicus brief [in the District Court] make similar arguments. The Court

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[7]"Parturition" is "the action or process of giving birth . . . ." *American Heritage College Dictionary* 997 (1993).

[8]The plain language of the Texas law requires only that the child in parturition "would otherwise have been born *alive*," not that the child be "*viable*." The partial-birth abortion statutes likewise are not limited to viable children.

concludes that these facts demonstrate that the Act serves compelling state interests.

Planned Parenthood of Wis. v. Doyle, 44 F. Supp. 2d 975, 982 (W.D. Wis. 1999) (citations omitted).

It logically follows from this Court's abortion decisions that the interest in protecting the life of the child in the process of birth arises from the change of legal status the fetus undergoes as she changes location, emerging from the maternal body toward complete birth. *Roe* affirmed the constitutional significance of the locational change that occurs as the child emerges from the maternal body. The child who has been completely born is a fully legal person, and the abortion liberty can make no claim on such a child's life. *Roe*, 410 U.S. at 156-57. Similarly, it follows that the child who is partially born is at least the subject of a compelling state interest, and any asserted abortion liberty holds, at most, diminished power over such a child.

"Birth" is "1.a. The emergence and separation of offspring from the body of the mother. b. The act or process of bearing young, parturition . . . ." *American Heritage College Dictionary* 141 (1993); "[t]he act of being born or wholly brought into separate existence." *Black's Law Dictionary* 154 (5th ed. 1979). "Born" is the "[a]ct of being delivered or expelled from mother's body, whether or not placenta has been separated or cord cut." *Id.* at 167.

A child who has fully emerged from the mother's body has obviously been "born" and is certainly a "person" who is the subject of compelling interests and the bearer of rights, as *Roe* recognized. But a child who is in the "process" of "being born," in the "act of being delivered," also falls within these common definitions. The state may properly conclude that such a child

is no longer "unborn" – no longer fully under the sway of the abortion liberty as described by *Roe* and *Casey*.

This Court has acknowledged that a state's interest in the life of a fetus grows as the fetus becomes able to survive apart from the mother's body – as the fetus becomes "viable." *Roe*, 410 U.S. at 163-64; *Casey*, 505 U.S. at 875-76. Likewise, a state's interest in protection of the life of an unborn child increases and becomes compelling as she emerges from the maternal body and proceeds toward full birth, reaching its apogee when live birth is completed. As the length of gestation has jurisprudential significance, so does location, and it is on the basis of the child's change in *location* that states assert a distinct compelling interest in protection of human life in the process of birth.

In the typical intact D&X abortion – the only procedure to which a properly construed partial-birth abortion statute applies – the child is delivered in a breech position, and only the child's head remains within the uterus. Much of the remainder of the child's body exists entirely outside the body of the woman. *See* Report of the AMA Board of Trustees ("One feature that distinguishes the D&X procedure from other destructive procedures is that the fetus may be partly outside the woman's body."). Surely, a state may conclude that such a child is no longer "unborn" and that the process of birth has proceeded to such a point that a state's interest in protection of the child has become compelling. "[T]he State cannot be faulted for acting where it can to outlaw an unnecessary procedure that in most cases in which it is used is literally inches away from being infanticide." *Doyle*, 44 F. Supp. 2d at 984.

Certainly, there is no precedent from this Court and there is no explicit language in the Constitution that precludes a state from determining that a child in the process of birth warrants

special protection as the subject of a compelling state interest. This Court has simply not addressed the issue.

Nor has this Court held that gestational development/viability are the *exclusive* criteria by which the Constitution allows the State to measure its interest in the protection of human life.[9] "Although abortion laws are typically justified according to the state's interest in maternal health or potential life, the *Casey* court specifically recognized that 'other valid state interest[s]' could justify a pre-viability abortion restriction.'" *Doyle*, 44 F. Supp. 2d at 983 (quoting *Casey*, 505 U.S.

[9]Lower courts which have rather summarily dismissed the claim that the State may maintain an enhanced interest in protection of the child in the process of birth have either erroneously regarded the gestational-development and viability criteria of *Roe* and *Casey* as exclusive or erroneously regarded the claim that locational criteria should be acknowledged as the addition of an unprecedented novelty to the analytic framework of *Roe* and *Casey*. *See Richmond Med. Ctr. for Women v. Gilmore*, 1999 WL 507453, at *35 (E.D. Va.) (July 16, 1999); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 615 (E.D. La. 1999); *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1132 n. 48 (D. Neb. 1998) (incorporating *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997)); *Planned Parenthood of S. Ariz. v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997).

But these decisions are in error. First, as noted in text, this Court recognized that "other valid state interest[s]" might also justify pre-viability abortion restrictions. *Casey*, 505 U.S. at 877. Second, the locational criterion of birth is at the very core of the analytic framework of both *Roe* and *Casey*: The "right to abortion" applies only to "unborn" fetuses and has no claim on a child once birth is accomplished – when the child is not merely the subject of a compelling interest, but also a person and rights-bearer. Thus, although it is true that recognition of an enhanced state interest in the child in the process of birth elaborates and clarifies one element of *Roe/Casey* jurisprudence, it does not introduce an alien element into it.

at 877).[10] In fact, it would be absurd to posit that the mere potential to live outside the womb – viability – has constitutional significance, while the actual fact of emergence of a living child from the womb has none whatever.

In short, a state may assert a distinct compelling interest in the protection of children in the process of birth in support of the Act. This locational interest exists apart from the substantial and compelling interests that the State might properly assert in "potential" human life based on gestational development, and it warrants special protection of the partially-born child.

The fully born child – whether "viable" or not – is the subject of a most compelling interest in the protection of the child's life, based solely on the locational change the child has undergone. Likewise, the child in the process of birth – whether "viable" or not – is the subject of an enhanced state interest by virtue of the child's change in location.

Furthermore, the abortion right wanes as a state's interest in protecting a partially born child waxes. This Court has recognized only a right to terminate pregnancy. *Casey*, 505 U.S. at 847. This right authorizes a pregnant woman to seek the means to terminate her pregnancy without state interference that unduly burdens her decision. *Id.* at 876-77. What are the outer boundaries of this right? Certainly, they do not extend beyond

[10]"After a trial, the district court in the Wisconsin case concluded that the intact D&X procedure is never necessary from the perspective of the patient's health." *Hope Clinic v. Ryan*, 1999 WL 974098 at *14 (citing *Doyle*, 44 F. Supp. 2d at 979-82). Neither the American College of Obstetricians and Gynecologists nor the American Medical Association could identify any situations in which the intact D&X would be the only medically appropriate option. *Id.* The Seventh Circuit declared that "[w]e proceed on the assumption, which appears to be shared by the American Medical Association, that the D&X is not the best or safest option in any articulable category of situations." *Id.*

the maternal body. A woman seeking an abortion could not claim that this right authorizes killing a child who survives an abortion procedure and is born alive.

Partial-birth abortion bans also build upon this understanding of the abortion liberty. They acknowledge that pregnancy may be terminated under this Court's precedent, but deny that it may be terminated in a manner that purposefully seeks to kill the child once the child has begun the process of birth, a process marked by the passage of the living child's body from womb into birth canal to outside the woman's body. At this point, any claim of a right to terminate pregnancy is substantially obviated as pregnancy is terminated. The power and dominion of the abortion liberty diminish as its purpose is achieved and the child is delivered. Since the right to abortion does not include an independent right to assure fetal death, the abortion liberty cannot be asserted to justify a separate act to kill the child as the child proceeds out of the maternal body.

In sum, just as a state's interest in protection of the child increases as the child proceeds toward birth, the woman's right to abortion diminishes as the child leaves the maternal body. Partial-birth abortion bans do not prevent the termination of any pregnancy. They prevent killing a child after pregnancy has been terminated and the process of birth has been substantially completed.

Therefore, the abortion right is not even implicated in a parturition/partial-birth situation, so that this Court need not reach any issue related to the reconsideration of *Roe*. Even if a *Roe/Casey* analysis were appropriate, partial-birth abortion statutes should be upheld as marking the precise moment when the waxing state interest in protecting the partially-born child outweighs the waning interest in terminating a pregnancy. They should also be upheld as not constituting an undue burden because they leave in place safe alternatives to the only procedure that is banned under a proper construction of the statute, i.e., intact D&X, and because they promote other important state interests, such as maternal health.

This Court should accept review of a partial-birth abortion case to clarify this vital issue of the precise moment when any residual abortion right must yield to the interest a state protects when it outlaws infanticide. A majority of the States now say this happens during parturition, regardless of how the child arrives at its new location that transforms the constitutional equation.

II. A Partial-Birth Abortion Case Should Be Accepted for Review as a Matter of Great Public Interest.

The partial-birth abortion cases involve matters of great public interest, given that Congress has twice passed bills that were vetoed by President Clinton and only narrowly avoided being overridden. *See*, *e.g.*, Cong. Rec. S18228, roll call #596 (Dec. 7, 1995); Cong. Rec. H2929, roll call #94 (Mar. 28, 1996); Cong. Rec. H3338-3339, H. Doc. 104-198 (Apr. 10, 1996). Even now the issue remains alive in Congress, with the Senate recently passing a revised partial-birth abortion bill. (S.1692 passed 63-34, Oct. 21, 1999.) *See also* James Bopp, Jr. and Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 Issues in L. & Med. 3, 1998 (describing more fully the national history of the partial-birth abortion debate).

Following the lead of Congress, nearly three-fifths of the states have enacted some form of partial-birth abortion ban,

most patterned closely after either the 1995 or 1997 federal models.[11]

The passage of these state partial-birth abortion bans has led to extensive litigation in federal courts.[12]

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[11]Twenty-seven states have enacted statutes substantially similar to Nebraska's: Ala. Code §§ 26-23-1, 26-23-3 to 26-23-4 (1998); Alaska Stat. §§ 18.16.050 (Michie 1998); Ariz. Rev Stat. Ann. 13.3603.01 (West 1997); Ark. Code Ann. §§ 5-61-201 to 5-61-203 (Michie 1997); Fla. Stat. Ann. §§ 390.11, 390.0111 (West 1998); Ga. Code Ann. § 16-12-144 (1998); Idaho Code § 18-613 (1998); 720 Ill. Comp. Stat. 513/5-5, 513/5-10, 513/5-20 (West 1998); Ind. Code Ann. §§ 16-18-2-267.5, 16-34-2-1(b), 16-34-2-7(d) (Michie 1998); Iowa Code § 707.8A (1998); Ky. Rev. Stat. §§ 311.595(3), 311.720, 311.990(11) (Michie 1998); La. Rev. Stat. Ann. § 32.9 (West 1998); Michigan Senate Bill 546, P.A. 107 (1999) (signed July 7, 1999) (eff. date 90 days after closing of 1999 legislative session); Miss. Code Ann. §§ 411-41-71, 411-41-73 (1998); Missouri Senate Substitute No. 3 for House Bills Nos. 427, 40, 196 and 404 (1999), to be codified at Mo. Rev. Stat. § 565.300 et seq.; Mont. Code Ann. § 50-20-401, as amended by 1999 Mont Laws 479; Neb. Rev. Stat. Ann. §§ 28-326, 28-328, 71-148(15) (Michie 1997); N.J. Stat. Ann. §§ 2A:65A-5 to -7 (West 1997); N.D. Cent. Code §§ 14-02.6-01 to 14-02.6-03; Okla. Stat. tit. 21, § 684 (1998); R.I. Gen. Laws §§ 23-4.12-1, 23-4.12-2, 23-4.12-3, 23-4.12-4 (1998); S.C. Code Ann. §§ 44-41-85, 16-1-90(F) (Law Co-op 1997); S.D. Codified Laws §§ 34-23A, 34-23A-32 (Michie 1998); Tenn. Code Ann. § 39-15-209 (1997); Va. Code Ann. § 18.2-74.2 (Michie 1998); Wis. Stat. §§ 895.038, 940.16 (1997); W.Va. Code §§ 33-42-3, 33-42-8 (1998). Three other states have attempted to target intact D&X in statutes using different language. *See* Kansas Stat. Ann. § 65-6721 (1998); Ohio Rev. Code §§ 2919.15 to 2919.19, 2307.51, 2305.11(C) (1997); Utah Code Ann. § 76-7-310.5 (1999)

[12]Partial-birth legislation has been the subject of numerous final federal district and state trial court decisions. *Summit Med. Associates, P.C. v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998) (question certified to Ala. S. Ct.); *Little Rock Family Planning Services, P.A. v. Jagley*, No. LR-C-97-581, 1999 WL 753928 (8th Cir. Sept. 24, 1999) (Ark.); *Planned Parenthood of Alaska v. State of Alaska*, No. 3AN-97-6019 CIV (Super. Ct. Mar. 13, 1998); *Planned Parenthood of S. Ariz. v. Woods*, 982 F. Supp. 1369 (D. (continued...)

Partial-birth type statutes have now been the subject of several final federal circuit court decisions. *Hope Clinic v. Ryan*, Nos. 98-1726, 99-2528, 99-2533, 1999 WL 974098 (7th Cir. Oct. 26, 1999) (Ill. and Wis.); *Carhart v. Stenberg*, Nos. 98-3245NE, 98-3300NE, 1999 WL 753919 (8th Cir. Sept. 24, 1999) (Neb.); *Planned Parenthood of Greater Iowa. v. Miller*, No. 99-1272SI, 1999 WL 753770 (8th Cir. Sept. 24, 1999) (Iowa); *Little Rock Family Planning Services, P.A. v. Jagely*, No. 99-1004EA, 1999 WL 753928 (8th Cir. Sept. 24, 1999) (Ark.); *Summit Med. Associates v. Pryor*, 180 F.3d 1326 (11th Cir. 1999) (Ala.) (limited to Eleventh Amendment issue); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) (Ohio).

Moreover, there are presently five partial-birth abortion cases pending on appeal in federal courts of appeals. *Rhode Island Med. Society v. Whitehouse*, — F. Supp. 2d — , 1999 WL 683846 (D. R.I. 1999), *appeal docketed*, Nos. 99-2095, 99-

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[12](...continued)
Ariz. 1997); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); *Midtown Hosp. v. Miller*, 36 F. Supp. 2d 1360 (N.D. Ga. 1998) (approving consent order), *dismissed*, No. 1:97-CV-1786-JOF, by order entered Sept. 9, 1998); *Weyhrich v. Lance*, No. 1:98-CV-117 (D. Idaho Oct. 12, 1999); *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998); *Planned Parenthood of Greater Iowa v. Miller*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997); *Intermountain Planned Parenthood v. Montana.*, No. BVD-97-477 (Mont. Dist. Ct. June 29, 1998); *Carhart v. Stenberg*, 11 F. Supp. 2d 1099 (D. Neb. 1998); *Women's Med. Prof. Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1994); *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998); *Rhode Island Med. Society v. Whitehouse*, 1999 WL 683846 (D. R.I. Aug. 30, 1999); *Richmond Med. Ctr. for Women v. Gilmore*, 51 F. Supp. 2d 441 (E.D. Va. 1999); *Planned Parenthood of Wis. v. Doyle*, 44 F. Supp. 2d 975 (W.D. Wis. 1999).

2141 (1st Cir. 1999) (proceedings stayed pending decision of a writ of certiorari in this case, Nov. 23, 1999); *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp. 2d 478 (D. N.J. 1998), *appeal docketed*, No. 99-5042 (3d Cir. argued Nov. 19, 1999); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), *appeal docketed*, Nos. 98-930, 99-2000 (4th Cir. 1999); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999), *appeal docketed*, No. 99-30324 (5th Cir. 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), *appeal docketed*, No.98-6671 (6th Cir. to be argued Dec. 15, 1999).

Two courts of appeals have now addressed the partial-birth abortion issue on the merits: the Eighth Circuit (represented by the present case) and the Seventh Circuit, *Hope Clinic v. Ryan* and *Christensen v. Doyle*, — F.3d —, 1999 WL 974098 (7th Cir. 1999) (upholding partial-birth abortion bans from Illinois and Wisconsin). The Fourth Circuit has also addressed the statutory construction issue in interlocutory orders staying the preliminary and permanent injunctions of a Virginia district court against implementation of the Virginia partial-birth abortion ban on the basis that as properly construed the statute bans only a procedure no plaintiff alleged doing, i.e., intact D&X. *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998), *aff'd*, 183 F.3d 303 (4th Cir. 1998) (staying prelim. injunction); *Richmond Med. Ctr. for Women v. Gilmore*, No. 98-1930(L) (4th Cir. Sept. 14, 1999) (order staying permanent injunction).

This issue is now ripe for this Court's resolution.

III. A Partial-Birth Abortion Case Should Be Accepted for Review Due to Conflict Between the Circuits.

A partial-birth abortion case is now ripe for review because there has been extended record development (with full trials in the Nebraska and Wisconsin cases), full development of the arguments through extended briefing, and a conflict between the Eighth Circuit (this case) and the Seventh Circuit. *Hope Clinic v. Ryan* and *Christensen v. Doyle*, — F.3d —, 1999 WL 974098 (7th Cir. 1999) (upholding partial-birth abortion bans from Illinois and Wisconsin).

CONCLUSION

For the foregoing reasons, Amici Curiae request the Court to accept one or more partial-birth abortion cases for review, requesting in the present case only review of the two questions set out at the beginning of the present brief.

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